

VZCZCXYZ0000
OO RUEHWEB

DE RUEHBUL #0068/01 0071140
ZNY SSSSS ZZH
O 071140Z JAN 07
FM AMEMBASSY KABUL
TO RUEHC/SECSTATE WASHDC IMMEDIATE 5315
INFO RUEKJCS/Joint Staff WASHINGTON DC PRIORITY
RUEKJCS/SECDEF WASHINGTON DC PRIORITY
RHEHAAA/NATIONAL SECURITY COUNCIL WASHINGTON DC PRIORITY
RUEAIIA/CIA WASHINGTON DC PRIORITY
RHEFDIA/DIA WASHINGTON DC PRIORITY
RUMICEA/USCENTCOM INTEL CEN MACDILL AFB FL PRIORITY
RHMFIS/CDR USEUCOM VAIHINGEN GE PRIORITY

S E C R E T KABUL 000068

SIPDIS

SIPDIS

STATE FOR P, SCA/FO (DAS GASTRIGHT), SCA/A (JRELK), L/PM
(EPELOFSKY), S/WCI
NSC FOR AHARRIMAN
OSD FOR KIMMITT
CENTCOM FOR CFC-A, CG CJTF-76, POLAD, CSTC-A

E.O. 12958: DECL: 01/02/2017

TAGS: [KAWC](#) [MARR](#) [MOPS](#) [PREL](#) [PGOV](#) [PHUM](#) [AF](#)

SUBJECT: DETAINEE LEGAL FRAMEWORK: GOA REPRESENTATIVES
CONVENE TO DISCUSS TEST CASES, REVIEW BOARD

REF: A. KABUL 05615
[1](#)B. KABUL 03149

Classified By: Acting Deputy Chief of Mission Sara A. Rosenberry for reasons 1.4(b) and (d)

¶1. (S) Summary: Deputy National Security Adviser Engineer Ibrahim Speenzada convened GOA representatives from the Ministries of Defense, Interior, Justice, and the National Directorate of Security on January 2 to discuss the legal basis for detention and prosecution of any detainees transferred from Guantanamo Bay (GTMO) or Bagram Theater Internment Facility (BTIF) to GOA custody and the establishment of a review board to assess detainees when they are transferred to Pol-e-Charki Block 4 (PeC B4). Representatives have been given test cases and executive summaries in English and have been requested to provide a collective written GOA response within two weeks of receiving Dari translations, which will be completed o/a January 15. We have asked that the response address both the composition of a review board and whether or not there is a legal basis for detaining/prosecuting the test case detainees. End Summary.

¶2. (S) As promised on December 26, 2006 (reftel A), Deputy National Security Adviser Engineer Ibrahim Speenzada promptly convened the following GOA representatives on January 2 to discuss the legal basis for detention and prosecution of any detainees transferred from Guantanamo Bay (GTMO) or Bagram Theater Internment Facility (BTIF) to GOA custody and the establishment of a review board to assess detainees when they are transferred to Pol-e-Charki Block 4 (PeC B4): Office of the National Security Council (ONSC) Deputy Minister Adviser Mohammad Ibrahim and aides Lutfullah Mashal and Akbar Quaraishi; Ministry of Interior (MOI) Deputy Minister for Security Affairs Abdul Hadi Khaliq; Ministry of Defense (MOD) General Counsel Mohammad Amin Nabi, Judge Advocate General (Brigadier) General Shir Mohammad Zazai, Chief Judge of the Military Court of Appeal Brigadier General Abdul Majeed, and Legal Service Director MA Quym; MOJ General Head of the Legislative Institute Said Yousuf Halim; and National Directorate of Security (NDS) Legal Adviser S. Zaher. CFC-A Staff Judge Advocate, CFC-A Deputy SJA, and CFC-A Rule of Law Officer attended as did acting Polmilcouns, Embassy Rule of Law Coordinator, and Polmiloff. Attorney General Sabit was to have cochaired the meeting with Engineer Ibrahim, but

President Karzai instead summoned him to another meeting.

¶13. (S) Note: The CFC-A and Embassy officers (except Acting Polmilcouns) had, however, previously met with AG Sabit on December 31 to discuss plans for the January 2 meeting and, specifically, to garner his views regarding a review board. Sabit had suggested representatives from the Attorney General (AG)'s office, MOI, MOD, and NDS sit full-time on the review board. In response to our suggestion that MOI, NDS, and Ministry of Justice (MOJ) officials now serving on teams reviewing cases at BTIF be designated to serve on the board, he appeared to respond positively. (Comment: We are not certain at this time of Sabit's position on MOJ participation. End Note.

¶14. (S) At the January 2 meeting, Polmilloff reviewed the Afghan August 2005 diplomatic note (reftel B) outlining the US responsibility to refurbish PeC B4 and the Afghan responsibility to detain, investigate and/or prosecute transferred detainees. She noted that the PEC B4 renovation and training of the new MOD guard force will be completed on schedule, making it possible to start transfers o/a February 26 should a legal framework and review board mechanism be identified and offered US advisory assistance on these issues.

¶15. (S) Polmilloff observed that while President Karzai has assured the USG that existing Afghan law will cover transfers, discussion to date has been theoretical rather than based on examining specific cases and that sanitized test cases are therefore being provided. She also outlined that while a board to review incoming detainees had been discussed when the now-defunct Presidential Directive was drafted, the board's specific composition was not yet agreed upon and issues of jurisdiction and length of pretrial

detention had not yet been discussed. Without attributing the idea to him, she relayed Dr. Sabit's suggestion that the Supreme Court issue an order for blanket approval of Kabul as venue for all transferred cases.

¶16. (S) All GOA principals except the MOJ representative then asked questions for an hour, with polmilloff and SJA responding. During discussion over detainees' status, the SJA clarified that all detainees under discussion are considered enemy combatants taken during an internal conflict, not POWs. Officials provided verbal assurances about the sufficiency of law--particularly NDS law--to cover detainee cases and their plans to gather more information in Afghanistan about detainees after transfer. They noted the difficulties of collecting new evidence years after the alleged crime and implications of the Article 7 Exclusionary Rule in the Afghan Criminal Procedure Code, which invalidates evidence collected without respect to legal requirements. Discussion on time in detention addressed whether time in US detention would count against time served, and the SJA advised time in US detention is considered administrative detention and therefore would not. Discussion also addressed the point at which Afghan pretrial detention begins (when the transfer to PeC B4 occurs, per SJA), the Afghan 30-day limit on pretrial detention, and limits on detention during all phases of trial. The flow of discussion precluded our answering whether the USG will transfer evidence along with the detainee; we will follow up with assurances that the USG will do so.

¶17. (S) Way Ahead: Officials now have been given six test cases in English sanitized by Detainee Assessment Branch/BITF: Two each High Level Enemy Combatants, High-Threat Low Level Enemy Combatants, and Low-Threat Low Level Enemy Combatants. (Note: We believe that some cases pose difficult issues regarding sufficiency of evidence and grounds for indefinite detention. End Note). A Dari translation for one case, executive summaries in English of all cases, and the English text of the August 2005 Afghan diplomatic note in reftel B have been provided. Translation of test cases and their executive summaries will be completed o/a 15 January by embassy, CFC-A, and BTIF translators and will be quality-checked by an ONSC staffer before distribution to GOA attendees.

¶ 8. (S) We have requested a GOA response within two weeks of the representatives' receipt of all documentation in Dari and have asked that this response confirm whether or not there is a legal basis for detaining/prosecuting the test case detainees as well as address the composition of a review board. Affirmative responses to both questions will demonstrate that GOA possesses the basic and necessary legal and administrative resources to facilitate detainee transfer.

In the event of affirmative responses, we will request that GOA draft and promulgate a statement of internal procedures that clearly explains how GOA will process and dispose of detainee cases.

NEWELL